Office - Supreme Court, U. S.
FILED
APR 4 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1944

No. 1103

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased,

Petitioner,

against

READING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

HERBERT ZELENKO,
Counsel.

STEPHEN A. MACHCINSKI,
HAROLD L. SCHWARTZ,
of Counsel.

INDEX

PAGE

I—Jurisdiction 2

II—Opinions Below 2

III—Summary Statement 2

Question Presented 4

Reasons for Granting the Writ 5

ARGUMENT:

POINT I—The Courts below erred in sustaining the motion to dismiss the complaint upon the ground of no negligence shown. The case should have been submitted to the jury on the question of negligence 7

POINT II—Certiorari should be granted upon the authority of the case of Brady v. Southern Ry. Co. 13

POINT III—It is respectfully submitted that the writ of certiorari prayed for should be granted; that the decisions of the Circuit Court of Appeals and of the District Court be reversed with costs 14

CASES CITED

PAGE

Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U. S. 356, 50 S. Ct. 283, 74 L. Ed. 896 8

Blair v. Baltimore & Ohio R. R. Co., 65 Sup. Ct. 545 ..... 5, 13

Brady v. Southern Ry. Co., 64 Sup. Ct. Rep. 232 ..... 5, 13

Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564 8

New Aetna Portland Cement Co. v. Hatt, 231 F. 611 8

Tennant v. Peoria and P. V. Railroad Co., 64 Sup. Ct. 499 ..... 5, 12

Tiller v. Atlantic Coastline R. Co., 65 Sup. Ct. 421 ..... 5, 9, 10, 12

Woodward v. So. Pac. Co., 94 Fed. (2d) 1028 9

STATUTES

Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) 1, 2, 4

Judicial Code, Sec. 240(a) (28 U. S. C. 347) 2

Supreme Court of the United States

No.

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased,

Petitioner,

against

READING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Judges of the Supreme Court of the United States:

Petitioner, Grazia Fantini, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit rendered February 12, 1945, affirming a judgment of the District Court for the District of New Jersey rendered March 22, 1944. The judgment dismissed petitioner's complaint on the merits. The complaint brought under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59), alleges the death of Grazio Fantini, petitioner's husband, due to negligence of respondent while in its employ.

The defense alleged in the answer (A16) and sustained by the District Court and the Circuit Court was that no negligence was proved.

I

Jurisdiction

Jurisdiction is based upon Section 240 (a) of the Judicial Code as amended; 28 U. S. Code 347.

The mandate of the Circuit Court of Appeals was stayed and withheld pending this application for a writ of certiorari in accordance with Rule 38 of the said Circuit Court of Appeals.

II

Opinions Below

The District Court directed a verdict for the respondent (A39), but filed no opinion.

The opinion of the Circuit Court of Appeals is not yet reported, but is annexed (A46).

III

Summary Statement

Plaintiff, Grazia Fantini, sued as administratrix of the estate of her deceased husband, Grazio Fantini, under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) to recover damages for his death. At the conclusion of the plaintiff's case the Court directed a verdict in favor of the defendant to which ruling exception was duly taken (A39).

Plaintiff's intestate was a watchman employed by the defendant and had been so employed for about twenty-eight years. He was the husband of the plaintiff and left surviving him besides his widow, three children. For the entire period of his employment with the defendant company he had been stationed at a crossing known as the Tulpehocken Street crossing in West Reading, Pennsylvania. Tulpe-

hocken Street runs north and south and the railroad crosses it east and west (A23).

John A. Mell, who had been subpoenaed by both parties, testified for the plaintiff that he was employed by the Potteiger Company, whose plant was located on the southwest corner of the intersection of the railroad crossing at Tulpehocken Street.

On January 12, 1942, he was proceeding northward on Tulpehocken Street in the direction of his place of employment and the railroad crossing (A24). It was light and he had a clear view (A24). When he was about 200 feet from the crossing and approaching it he saw plaintiff's intestate at the crossing with his stop sign in his hand and facing south toward Mr. Mell. Mell knew plaintiff's intestate to be the watchman at that crossing, having seen him there before (A25).

As the witness neared the crossing and was about 30 feet from the south side of it he turned his automobile to the left to go into the yard of the Potteiger Company (A26). At that time he stopped his car and it was facing in a northwest direction (A26). He looked again in the direction of plaintiff's intestate and saw him still standing with his stop sign on the northwest side of Tulpehocken Street across the tracks (A26). The witness further testified that plaintiff's intestate was about 2 or 3 feet north of the northernmost rail at that time (A26).

At that time a train approached the crossing in an easterly direction and the witness first saw it as it emerged from view from behind the Potteiger Company building (A27). This building was located about 50 feet west of the crossing.

The witness glancing to his right then saw through the wheels of the locomotive, plaintiff's intestate flying through the air on the north side of the tracks (A28).

The witness did not remember whether or not a whistle had been blown at that time as the train was approaching the crossing (A27). The body of the deceased was flying

through the air in an easterly direction. The train although proceeding easterly, was on the westbound track, which was the north track. This was against the current of traffic and not on the usual track (A28). The speed of the train was between 30-40 miles an hour (A28). It did not slow down as it was approaching the crossing. After the accident it did not stop but proceeded on its way (A28).

The witness thereupon summoned aid and located the body of plaintiff's intestate across Tulpehocken Street on the northeast corner of the crossing about 5 or 6 feet from the northernmost rail (A28).

Grazia Fantini, the plaintiff, testified that her husband had been her sole support and at the time of his death he was earning approximately $24 a week, all of which was used to provide food, clothing and shelter for the family and that during 1941 (the year preceding his death) the deceased had received a total of $1,146 as wages from the defendant (A21).

At the conclusion of the plaintiff's case, the Trial Court granted respondent's motion to dismiss, stating in substance that no negligence was shown nor could a jury properly infer negligence. Thus the Trial Court ruled despite the theory of petitioner that the unusual movement of the train and the question of adequate warning of this unusual movement to the deceased was a question for the jury upon the facts and the presumptions. The Circuit Court of Appeals affirmed upon the ground of no negligence shown. These decisions were in direct conflict with the applicable law.

Question Presented

Under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59), was sufficient evidence of negligence furnished by the record to justify submission of the case to the jury?

Reasons for Granting the Writ

1. The decision in *Brady* v. *Southern Ry. Co.*, 64 Supreme Court Reporter 232 (1943), requires that in cases brought under the Federal Employers' Liability Act, the question whether sufficient evidence of negligence is furnished by the record to justify submission of a case to a jury must be determined by the Supreme Court, finally.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Supreme Court in the following cases:

Tiller v. *Atlantic Coastline R. Co.*, 65 Sup. Ct. 421.
Tennant v. *Peoria and P. V. Railroad Co.*, 64 Sup. Ct. 409.
Blair v. *Baltimore & O. R. Co.*, 65 Sup. Ct. 545.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to the Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 8647, October Term, 1944, Grazia Fantini, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased, Plaintiff-Appellant vs. Reading Company, Defendant-Appellee", and that the decisions of the said Circuit Court of Appeals in the said case and of the District Court be reversed and that your petitioner have such other and further relief as in the premises may be just.

GRAZIA FANTINI,
By HERBERT ZELENKO,
Counsel.

STEPHEN A. MACHCINSKI,
HAROLD L. SCHWARTZ,
of Counsel.

Certificate

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

HERBERT ZELENKO,
Counsel.

ARGUMENT

POINT I

The Courts below erred in sustaining the motion to dismiss the complaint upon the ground of no negligence shown. The case should have been submitted to the jury on the question of negligence.

At the scene of the accident the tracks of the respondent run in an east and west direction. There is a double track, one eastbound and one westbound. Tulpehocken Street, which crosses the tracks runs in a north and south direction.

There is direct evidence that immediately preceding the accident, the deceased was standing on the north side of the crossing about 2 or 3 feet from the northernmost rail (A26). He was standing at a place where he was obliged and required to stand. He was facing directly south and holding in his right hand a stop signal for vehicular and pedestrian traffic (A26). There is direct evidence and a concession by the respondent that the train which struck the deceased was moving in an unusual manner. It was an eastbound train and it was on the westbound track. It traversed the crossing against the current of traffic. It was proceeding on the northerly track instead of on the southerly track. The southerly track was the usual track for eastbound trains (A28 to 37).

Obviously, the witness Mell was not in a position to see exactly which part of the engine struck the deceased, as it passed between him and the deceased at the time. Also, there appears to be a hiatus between the time when Mell saw the engine almost upon the crossing and when he next saw deceased's body being hurled through the air. There is nothing in the testimony of the witness Mell or in any other part of the record, which indicates that the deceased had moved in any way from the position which he had assumed long before the train approached the crossing

and in which he was seen almost instantaneously preceding the accident. There is a clear and conclusive inference that the body of the deceased or his right hand holding the stop sign was struck by some portion of the front end of the engine or some appurtenance thereon which overhung or extended northerly from the rail, as his body was seen through the drivers hurtling through the air (A28). However, even if it is contended that the direct evidence is insufficient to establish that the deceased was actually engaged in the performance of his duties at the time he was struck, he would be entitled to a presumption on that point. The absence of an eyewitness was not decisive. There was sufficient evidence to show that he was obliged to be at the point of the accident at the time thereof. To this evidence must be added the presumption that deceased was actually engaged in the performance of his duties and exercising due care for his own safety at the time of his death. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488, 26 S. Ct. 303, 306, 50 L. Ed. 564; *Atchison, Topeka & Santa Fe R. Co.* v. *Toops*, 281 U. S. 356, 50 S. Ct. 283, 74 L. Ed. 896; *New Aetna Portland Cement Co.* v. *Hatt*, 6 Cir., 231 F. 611, 617.

The respondent had prescribed certain rules relating to signals to be given by trains when proceeding against the current of traffic (A34 et seq.). There is in evidence another rule of the respondent relating to the position to be assumed by a watchman when performing his duties at a crossing in relation to the current of traffic (A34).

Deceased had been employed by the respondent in the same capacity and in the same location, as a watchman, for over twenty-eight years and it is reasonable to infer that he had sufficient knowledge and experience to perform his duties properly; that he was acquainted with the dangers incident to his employment and that he was acquainted with the rules and regulations governing his job. It is also reasonable to infer that he was acquainted with the regular movements of the trains, of the tracks upon which they ran and with the regular or usual current of traffic.

A jury must determine the question of negligence from all of the evidence, including the presumptions. *Woodward* v. *So. Pac. Co.*, 94 Fed. (2d) 1028.

Upon the rule relating to the position to be taken by watchmen at a crossing, which required deceased to assume a place when practicable, near the opposite track from which a train was approaching and upon the evidence, including the proper presumption that the deceased was performing his duty and exercising due care for his own safety, a clear inference must result that the deceased anticipated and expected that the train involved in the accident was approaching the crossing on the usual or southerly track and not upon the unusual or northerly track near which he was standing.

The evidence clearly shows that the decedent took a position near the track where he was obliged to and by the rules of the company required to take when a train is approaching in the usual and customary way.

The fact that the train approached against the current of traffic clearly indicates that the deceased did not receive any notice or warning of the unusual movement. Whether or not a bell was rung or a whistle blown from the engine would not exonerate the respondent from its negligence. It was the respondent's duty knowing of the unusual movement of the train to warn the deceased by some means or device of the unusual condition even before the train arrived at a point where it was required to ring a bell or blow a whistle. Such signal from the engine, if it were given, would only go to the question of contributory negligence on the part of the decedent.

The recent case of *Tiller* v. *Atlantic Coastline R. Co.*, 65 Sup. Ct. 421, wherein there was involved the question of negligence in the unusual movement of a train, is strikingly applicable to the instant case. On pages 423, 424 of its opinion this Court stated:

> "An additional ground of the reversal of this cause by the Circuit Court of Appeals was that part of the District Court's charge to the jury set out in the

margin. It instructed the jury that if they believed that the back-up movement was an unusual and unexpected one, and a departure from the general practice in making up that particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of that movement and if the jury found that the defendant failed to perform this duty, and that failure was the proximate cause of the injury, its verdict should be for the plaintiff. The original complaint alleged this as one of the grounds of negligence. The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars, without giving 'adequate warning of the movement'. Compare Toledo, St. Louis & W. R. R. v. Allen, 276 U. S. 165, 171, 48 S. Ct. 215, 217, 72 L. Ed. 513. The charge of the District Court in this respect was correct."

In the present case and in the *Tiller* case the following similar questions were involved: The unusual movements of the train (in the instant case this unusual movement is conceded); the question as to whether the employee had cause to believe that such an unusual movement would be made; and the question as to whether he had received adequate warning of the unusual movement.

In footnote 3 of its opinion in the *Tiller* case, this Court sets forth a portion of the charge of the District Court and approves it. It reads, as follows:

"The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the en-

gine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff."

It is petitioner's contention that her case should have been submitted to the jury upon like instructions.

There is testimony that for a distance of approximately 400 feet west of the crossing the track proceeds in a straight line (A33). The testimony is that it was light and clear on the day of the accident. A jury could reasonably infer that the deceased was clearly visible from the cab of the engine. The standard of care required of the respondent being greater under these unusual circumstances, negligence could be spelled out from the fact that the train did not slow down when it approached the crossing; that it crossed at the rate of about 30-40 miles an hour (A28) and that although the body of the deceased was hurtling through the air in front of the cabin the train did not stop, even after striking the deceased. The employees of the respondent, knowing they were travelling against the current of traffic, were obliged to use added caution and an added degree of care. The speed at which the train was proceeding under these unusual circumstances could be considered by the jury as a failure to use additional caution or care under the circumstances. Furthermore, in the instant case, the respondent failed to use even ordinary care. From the foregoing facts the jury could infer that no one on the engine kept a proper lookout, or else they would have seen the deceased. This was negligence.

There was no testimony as to whether or not the proper or any signal was given by the train when it approached the crossing. It cannot be said that the lack of evidence on this aspect of the case sustains the decisions of the courts below that this causes a failure of proof on the part of the plaintiff. The particular rule regarding the signal in these circumstances (A34) does not require the signal to be given at any particular distance from the crossing, but merely states that it must be given "when approaching". This, of course, leaves to the discretion of the engineer the time when the signal should be given. No one can say how far from the crossing would be considered an approach thereto. It might be five feet or five hundred feet.

Therefore, it was unnecessary for the petitioner to prove the failure of the respondent to give the required signal for the reason that whether or not the signal was given and whether or not there was any direct evidence by either party on this point it would still be a question of fact for the jury as to whether or not the signal or any other adequate warning was given in time for the deceased to proceed to a place of safety from the position of danger in which respondent had placed him by reason of his duties. *Tiller* v. *Atlantic Coastline R., supra.*

The trial court, in granting its motion to dismiss, selected its own conclusion as to the cause of the accident. In its discussion with respondent's counsel it stated (A37):

> "Mr. Gildea: As I say, there is no actual eye witness to the accident.
> The Court: He must have moved closer to the track.
> Mr. Gildea: Or he would not have been struck.
> The Court: The train did not make a detour."

Any determination upon the inferences and the evidence was a matter for the jury and this honorable court has so held in the case of *Tennant* v. *Peoria & P. U. Railroad Company,* 64 Supreme Court, 409 (1944) where, at page 412, the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take

the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The total point of judicial review is the reasonableness of the particular inference of conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

See also *Blair* v. *Baltimore & Ohio R. R. Co.*, 65 Sup. Ct. 545.

The Trial Court as one of the reasons for its decision to dismiss the complaint made much of the fact that in the *Tennant* case, cited supra, there was a signal given. However, the Trial Court's reasoning which appears in the appendix at page 38 is contrary to the principle enunciated in the *Tiller* case, also cited supra, wherein this honorable Court holds that the question of adequate warning to the deceased was one for the jury. The Circuit Court of Appeals in its opinion erroneously followed the reasoning of the District Court.

POINT II

Certiorari should be granted upon the authority of the case of *Brady* v. *Southern Ry. Co.*

In the recent case of *Brady* v. *Southern Ry. Co.*, 64 Sup. Ct. 232, this honorable Court held that in all cases brought

under the Federal Employers' Liability Act, the question as to the sufficiency of the evidence of negligence must be decided by the Supreme Court in the final instance.

POINT III

It is respectfully submitted that the writ of certiorari prayed for should be granted; that the decisions of the Circuit Court of Appeals and of the District Court be reversed with costs.

Respectfully submitted,

HERBERT ZELENKO,
Counsel.

STEPHEN A. MACHCINSKI,
HAROLD L. SCHWARTZ,
of Counsel.